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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1462

DONALD SPARKS,
PETITIONER

versus

STATE OF ALABAMA
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDICIES

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Donald Sparks v. State of Alabama, 46 Ala. App.——— 242 So. 2d 403 (1970)

The Supreme Court of Alabama denied certiorari and this order is reported as follows:

Donald Sparks v. State of Alabama, Ex Parte Donald Sparks, 286 Ala.———, 242 So. 2d 408 (1970)

II

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama which was rendered on September 15, 1970. A petition to the Supreme Court of Alabama for a writ of certiorari was denied on December 17, 1970.

Petitioner applies for this writ of certiorari under the provisions of 28 U.S.C. 1257(3).

III

QUESTION PRESENTED FOR REVIEW

Does a state deprive a criminal defendant of due process of law by failing to compel the attendance of witness for said defendant at his trial, when those witnesses are beyond the jurisdiction of said state?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT OF THE CASE

Petitioner was indicted for robbery by the Grand Jury of DeKalb County at the July Term 1966 (R. p. 1). In open court and represented by his attorneys, the petitioner was ar-

raigned on May 6, 1968, and entered a plea of not guilty (R. pp. 232-233). Petitioner's motion to quash the indictment was denied (R. p. 233), and cause was set for trial May 20, 1968.

Petitioner's motion for discontinuance was overruled on May 20, 1968, as was a subsequent motion for continuance (R. p. 233). The illness of the juror resulted in a mistrial.

In open court, and represented by his attorneys, petitioner was rearraigned on July 23, 1968, and entered a plea of not guilty (R. p. 234). The cause was reset for trial for August 26, 1968. A jury was struck and empaneled on August 28, 1968.

At this point in the proceedings petitioner moved for a continuance on the ground that two of his witnesses were absent from court. From the testimony on this motion it was apparent that the witnesses had not been served with subpoena because they were outside of the State of Alabama. It also appeared that the Sheriff of DeKalb County had not been informed of the location of these witnesses. No showing was made of what these witnesses would testify. There was no indication that they would be available later (R. pp. 50-59). Later during the trial in chief there was an attempt to introduce tape recorded statements by these witnesses, but these were rejected as hearsay (R. pp. 142-147).

The evidence was presented to the jury and the tendencies of this evidence were outlined by the Court of Criminal Appeals of Alabama as follows:

> "The evidence tends to show that three armed men, with scarves covering their faces, entered the home of Wendell West, in Fort Payne, Alabama, around eleven

o'clock p. m., June 27, 1966. They handcuffed and bound Mrs. Cleo West and Mrs. Wilson, a woman companion, and removed the keys to Mrs. West's Dodge Dart automobile from her purse. When Mr. West came home about one o'clock two men, each holding a gun to his head, took $344.00 from his pocket. Mr. West was then taken into the bathroom and immersed in a bathtub full of water in an effort to to force him to reveal the whereabouts of his money. During the scuffle in the bathroom defendant's scarf dropped and Mr. West saw defendant's face. Mr. West was taken into the room where his wife and Mrs. Wilson were. He was handcuffed and his eyes were taped. Defendant took the keys to Mr. West's office and left with one of the men, later identified as William K. Knight. The third man remained at the house for about an hour and a half, until someone came and called to him and he left.

"Officers Kean and Shirley, Fort Payne policemen, stopped the West's Dodge Dart on a Fort Payne street during the early morning hours of June 28th. Defendant was driving the car. Knight was riding as a passenger. Neither of them could produce identification or driver's license. There were two pistols and a carbine in the car. Three cars were driven to the police station. Officers Kean and Shirley in the lead car and Sergeant Pack, a Fort Payne policeman in the police car behind the Dodge Dart driven by the defendant. Upon reaching the police station, the defendant got out and walked over to the side of Sergeant Pack's car and talked with him through the window. Defendant then ran back to the West car and drove away. The car was found abandoned some two or three hours later.

"Sergeant Pack was also indicted for the robbery

of Wendell West. He testified he had never seen defendant prior to the trial. He testified Mr. Clyde Traylor, representing the State, had promised him a "clean bill of health" if he would identify the defendant, Donald Sparks, as the driver of the West Automobile.

"Donald Sparks testified as a witness in his own behalf that he was not in Fort Payne on the evening of June 27, 1966, or the early morning of June 28; that he was in Sapulpa, Oklahoma; that he had never entered the West home or driven the Dodge Dart.

"The defendant sought to establish an alibi through the testimony of Mr. Jesse Henson, owner and manager of a motel in Sapulpa, who testified Donald Sparks was registered in his motel from June 26 to June 29, 1966. He identified defendant as the person who registered and that he was present on each of the three nights.

"Mr. Clyde Traylor, for the State in rebuttal, stated he had never made a promise to Sergeant Pack pertaining to Pack's identification of defendant." *(Sparks v. State,* 242 So. 2d 403, 405).

The jury returned a verdict of guilty and a sentence of ten years imprisonment in the penitentiary (R. p. 234). Appellant was adjudged guilty and sentenced in accord with the verdict on September 3, 1968 (R. p. 235).

An appeal to the Court of Criminal Appeals of Alabama resulted in affirmance. *Sparks v. State,* 46 Ala. App.———, 242 So. 2d 403 (1970). It is this judgment of affirmance that petitioner now seeks to have this Honorable Court review.

VI

SUMMARY OF THE ARGUMENT

A state does not deprive a criminal defendant of due process by failing to subpoena witnesses for such defendant, where this failure is the result of the defendant's failure to provide state officials with information on the location of the witnesses.

Since the judicial power of state courts is limited by state boundaries, such courts are unable to compel persons who are beyond state boundaries to attend sessions of court.

Where a state provides criminal defendants with lawful procedures for obtaining the evidence of persons who are without such state, it does not deprive these defendants of due process of law by failing to subpoena such persons, since they are beyond the jurisdiction of the state.

A statute which provides for subpoenaing witnesses from without a state to attend the courts of the state is unconstitutional in that it denies such witnesses due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

The Uniform Act To Secure The Attendance Of Witnesses From Without A State In Criminal Proceedings (which will be referred to hereinafter as "the Uniform Act") is unconstitutional in that it deprives indigent criminal defendants of equal protection of the laws and due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

VII

ARGUMENT

Petitioner seeks the ultimate reversal of his conviction for this brutal robbery on the ground that he was denied due process of law by being put to trial without two of his witnesses. He claims that the State of Alabama did not exercise diligence in locating these witnesses. Petitioner also asserts that Alabama should have a statutory proceeding for compelling the attendance at court of witnesses who are outside of Alabama. Specifically, petitioner recommends the Uniform Act. (See Appendix A, page A-1) Respondent will answer each of these arguments in turn.

A

On the day of his trial, after the jury had been struck, petitioner moved for a continuance on the grounds that two of his witnesses, William K. Knight and Ida Bell Wilson, were absent from court.

Subpoena had been issued for these witnesses, but the sheriff had not been informed of the location of Mr. Knight and Mrs. Wilson. His investigation indicated that they were both outside of Alabama.

Petitioner proved in support of his motion for continuance that an automobile had been registered in Mr. Knight's name and that a Fort Payne address was listed for him. There was no proof that Mr. Knight could actually be found at this address but it was proven that this address was the residence of one Noles.

In support of his motion for continuance, petitioner also proved that Mrs. Wilson had passed through Fort Payne,

but it was apparent that the sheriff did not know this.

It is clear then that the sheriff made a diligent effort to serve these subpoenas, but was unable to do so, because he did not have sufficient information. If petitioner knew where and when these persons could be served with subpoena, it was his duty to inform the sheriff. It was not the sheriff who failed in diligence here but petitioner.

Of course, it is apparently conceded by petitioner that these witnesses were outside of Alabama, at the time the sheriff was seeking them. This being the case, they were beyond the judicial power of the Circuit Court of DeKalb County. A letter from petitioner to these witnesses asking them to come to Alabama to testify in his behalf would have been equally effective as a subpoena issued by the Circuit Court and served on them by the Sheriff of DeKalb County. Respondent cannot be accused of failing to do what it had no legal right or power to do. See *Minder v. Georgia*, 183 U.S. 559, 46 L. Ed 328, 22 S. Ct. 224 (1901).

Petitioner was not without remedy under Alabama law. Witnesses in criminal cases who are beyond the judicial power of the State of Alabama, may be deposed and these depositions are read into evidence at the trial of the case. See Title 15, Section 297 and 300 of the 1940 Code of Alabama (recomp. 1958). (Appendix B, page A-6). However, petitioner took no advantage of these statutes.

When petitioner found that his witnesses were unavailable, he could have made a showing for them or entered stipulations. These would have required the consent of the prosecutor, but they should have been explored by petitioner.

There can be no doubt that the state must provide compulsory process to an accused person so that he can compel

the presence of witnesses in his behalf at his trial. *Washington v. Texas*, 388 U.S. 14, 18 L. Ed 2d 1019, 87 S. Ct. 1920 (1967). However, it is equally clear that the state is not required to do the impossible. *Minder v. Georgia*, supra.

The ruling of which the petitioner seeks review is the denial of a continuance by his trial judge. The granting and denying of continuances is universally recognized to be within the discretion of the trial court. 17 Am Jur, 2d Continuance, Section 3. Clearly, in the light of petitioner's failure to show when these witnesses would be available and what they would testify, the trial judge did not abuse his discretion in denying continuance. The offer of tape recorded statements by these witnesses at the trial on the merits was clearly improper and could not affect the earlier denial of continuance. The adverse ruling on petitioner's motion for continuance was especially proper when it is considered that it was based on matters which were known to petitioner before the day of the trial, yet petitioner delayed until the very moment of the evidentiary phase of his trial to make his motion. A motion for continuance which is tardily made is properly denied *Spadoni, v. Maggenti* 121 Cal. App. 147, 8 P. 2d 874 (1932), *Tiffin v. Cummings*, 144 Cal. 612, 78 P. 23 (1904).

B

Petitioner asserts that he was denied due process of law by Alabama's failure to have a statutory process for subpoenaing witnesses from without Alabama.

It is axiomatic that a state has no authority beyond its own borders, and it is equally axiomatic that a state may not ordinarily compel a person within its borders to leave the state. Yet, under the procedures urged by petitioner, a per-

son could be removed from one state and brought to another against his will.

It could be argued that what petitioner urges is similar extradition proceedings and "long arm" statutes. But this is not the case. When a person commits a crime, he knows that he could be extradited to the state of the crime from any state to which he might flee. A person who drives an automobile, does business, etc. in a state knows or should know, that by doing so he is conferring jurisdiction on the courts of that state in any suit growing out of his activity.

Under the procedure urged by petitioner, however, a person who might never have been in a state, could be removed to that state. He would be separated from his home, family, and work, not because he committed a crime or is even accused of one but because he might have some information relevant to a criminal prosecution. He would be compelled to leave his home state which would have no jurisdiction over the cause and to enter a foreign state which would have have no jurisdiction over him, and to do this he might have to pass through states which would have jurisdiction over neither the cause nor him.

The Fourteenth Amendment to the United States Constitution protects the precious right of innocent Citizens to remain at liberty. It is difficult to invision a more flagrant violation of this right than that of jurisdictionless courts seizing innocent people and transporting them to other states.

For this reason the procedure urged by petitioner is unconstitutional. See *In re Allen* 49 D & C 631 (Penn, 1940)

C

Petitioner recommends that the State of Alabama be

compelled to pass the Uniform Act (Appendix A, p.A-1).

This statute was drafted and recommended to the states by the National Conference of Commissioners on uniform state laws in 1936, and provides for compelling the attendance of witnesses in the courts of a foreign jurisdiction.

While the purposes of this statute are praiseworthy, the statute is unconstitutional for the reasons set out under "B", above.

It should also be noted that under the Uniform Act, the witness is compensated for his travel by the amount of ten cents per mile and for his separation from his home, family and work by payment to him of five dollars per day. See Section 3 of the Uniform Act. (Appendix A, page A-3). Even a day laborer who receives the minimum wage would suffer a great loss if he were subpoenaed under the Uniform Act. The Uniform Act, therefore, not only deprives persons of their liberty as pointed out in "B", above, but also deprives wage earners of their wages.

But there is another reason that the Uniform Act is unconstitutional.

It has been universally held that criminal defendants seeking to subpoena witnesses under the Uniform Act must pay the witnesses' expenses themselves. See *Olsen v. State,* ———*Minn.* ———, 177 N. W. 2d 424 (1970); *State v. Brount,* 200 Or. 35, 264 P. 2d 419, 44 A.L.R. 2d 711 (1953), U.S. Cert. Den. 347 U.S. 962, 98 L. 1105, 74 S. Ct. 711; *State v. Fourquette,* 67 Nev. 505, 221 P. 2d 404 (1950), U.S. Cert. Dent. 341 U.S. 932, 95 L. Ed 1361, 71 S. Ct. 799. There is no provision under the Uniform Act for payment by the public of the expenses of witnesses subpoenaed by indigent crimi-

nal defendants. See *State v. Hemmenway*, 80 S.D. 153, 120 N.W. 2d 561 (1963).

For this reason the Uniform Act discriminates against indigent people who are accused of crimes. In doing so the Uniform Act violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. And, since the prosecution can compel the attendance of witnesses from outside a state to appear against an indigent criminal defendant, while he cannot obtain such witnesses in his own behalf, the Uniform Act violates the due process requirement of the Fourteenth Amendment of our Constitution.

VII

CONCLUSION

It is, therefore, apparent that the State of Alabama made diligent efforts to subpoena petitioner's witnesses and that it has provided criminal defendants with procedures for obtaining and presenting the evidence of witnesses in their behalf who are beyond the jurisdiction of Alabama. It is also apparent that petitioner did not take advantage of any of these procedures.

Surely, the State of Alabama can not be condemned for failing to "skate unto constitutional thin ice" by passing statutes such as are urged by petitioner.

For all of the foregoing reasons, respondent submits that petitioner was properly convicted and that none of his

constitutional rights were violated. And, therefore, the writ of certiorari prayed for in this cause should be denied.

Respectfully submitted,

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APPENDIX A

HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEDINGS OF THE FORTY-SIXTH ANNUAL CONFERENCE, PAGES 335-338

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS

(This is a revision, approved and adopted in 1936 at the Forty-sixth Annual Conference held in Boston, Massachusetts, of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases.)

Be it enacted, etc. (Use the proper enacting clause for the State.)

Section 1. *Definitions.* "Witness" as used in this act shall include a person whose testimony is desired in any proceeding or investigation by a Grand Jury or in a criminal Action, Prosecution or Proceeding.

The word "State" shall include any territory of the United States and the District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

Section 2. *Summoning Witness in this State to Testify in another State.* If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testitfy in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a ma-

terial witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be *prima facie* evidence of all of the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be *prima faci* proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forth-

with taken into custody and delivered to an officer of the Requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollar for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Section 3. *Witness from Another State Summoned to Testify in This State.* If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dol-

lars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court record in this state.

Section 4. *Exemption from Arrest and Service of Process.* If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state, under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

Section 5. *Uniformity of Interpretation.* This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

Section 6. *Short Title.* This act may be cited as "Uniform Act to Secure the Attendance of Witness from Without a State in Criminal Proceedings."

Section 7. *Repeal.* All acts or parts of acts inconsistent with this act are hereby repealed.

Section 8. *Constitutionality.* If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be servable.

Section 9. *Time of Taking Effect.* This act shall take effect . . . . . .

APPENDIX B

CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 15

§ 297. Depositions in criminal cases; when taken by defendant.—The defendant may take the deposition of any witness, who, from age, infirmity, or sickness, is unable to attend court; or who resides out of the state, or more than one hundred miles from the place of trial, computing by the route usually traveled; or who is absent from the state; or where the defense, or a material part thereof, depends exclusively on the testimony of the witness.

* * * * *

§ 300. Taken as in civil cases; when not read.—Depositions taken under the provisions of the three preceding sections are governed by the same rules which are applicable to depositions taken in civil cases at law; and no such deposition can be read in evidence on the trial, if it appear that the witness is alive, and able to attend court, and within its jurisdiction.

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, and I, Joseph G. L. Marston, III, one of the attorneys for the respondent, hereby certify that on this ————day of ————, 1971, we did serve the requisite copies of the foregoing Brief and Argument of Respondent and Appendices on the Honorable Fred Blanton, Jr., whose address is Twenty-One Twenty-One Building, Suite 1627, Birmingham, Alabama, 35203, and The Honorable Loma B. Beaty, whose address if Fort Payne, Alabama, 35967, Attorneys for Petitioner, by mailing said copies to them at the aforesaid addresses with with postage prepaid.

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